United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

75-1174

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B
P/S

UNITED STATES OF AMERICA

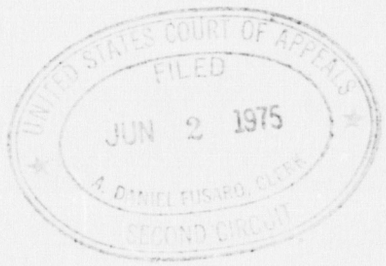
-against-

JAMES REED,

Defendant-Appellant

On Appeal from the United States District Court
for the Southern District of New York

APPELLANT'S APPENDIX



ELEANOR JACKSON PIEL
Attorney for Defendant-
Appellant
36 West 44th Street
New York, New York 10036
MU 2-8288

PAGINATION AS IN ORIGINAL COPY

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RELEVANT DOCKET ENTRIES

Date	
Sept. 10, 1974	Filed Indictment
Jan. 9, 1975	Filed Notice of Motion for Bill of Particulars
Apr. 17, 1975	Filed Remand Order Without Bail
Apr. 8, 1975	Filed Judgment and Commitment
Apr. 9, 1975	Filed Notice of Motion for New Trial and Judgment of Acquittal
Apr. 9, 1975	Filed Notice of Appeal

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

- v -

JAMES REED,

Defendant.

NOTICE OF APPEAL

74 Cr. 861

----------x

NOTICE OF APPEAL

TO

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NOTICE is hereby given that James Reed, above-named appeals to the United States Court of Appeals for the Second Circuit from the judgment of conviction entered by the Hon. Edmund L. Palmieri on April 8, 1975.

/s/
Eleanor Jackson Piel
Attorney for the defendant

36 West 44 Street
New York, N.Y. 10036
212 682-8288

Notice to:
Paul J. Curran Esq.
U.S. Court House
Foley Square
New York, N.Y. 10007

DEFENDANT"S APPLICATTON TO PROCEED ON APPEAL IN FORMA PAUPERIS IS GRANTED

/s/ Edmund L. Palmieri

SO ORDERED
New York, N.Y.
April 9, 1975

INDICTMENT

USA-33s-510 - IND./INF. (Conspiracy to distribute and possess with intent to distribute narcotic drug.)
Rev. 5-27-72

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA, :

- v - :

GERALD MICHAEL HARDY and JAMES REED, :

Defendants. :

- -x

INDICTMENT

74 Cr.

1. From on or about the 1st day of January, 1974 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York,

GERALD MICHAEL HARDY and
JAMES REED

the defendants and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812,

841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about the 13th day of February, 1974, the defendant GERALD MICHAEL HARDY had a conversation with William Simpson at 26 East 60th Street, New York, New York;

2. On or about the 13th day of February, 1974, the defendants JAMES REED and GERALD MICHAEL HARDY had a conversation with William Simpson in the vicinity of 96th Street and Park Avenue, New York, New York;

3. On or about the 19th day of February, 1974, the defendant JAMES REED went to the vicinity of 96th Street and Park Avenue, New York, New York.

(Title 21, United States Code, Section 846.)

s/
FOREMAN

s/
PAUL J. CURRAN
United States Attorney

NOTICE OF MOTION FOR BILL OF PARTICULARS AND DISCOVERY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	74 Crim 861
- v -	:	NOTICE OF MOTION FOR BILL OF PARTICULARS AND DISCOVERY
GERALD MICHAEL HARDY and JAMES REED,	:	
Defendants.	:	Carter, J.

SIRS:

PLEASE TAKE NOTICE that upon the indictment herein and upon the annexed motion and memorandum of law, the defendant, James Reed, will move this Court before the Hon. Robert L. Carter at the United States Courthouse, located at Foley Square on January 24, 1975 at 10 a.m. or as soon thereafter as counsel may be heard for an order, pursuant to Rule 7 (f) of the Federal Rules of Criminal Procedure, directing the Government to file and serve a bill of particulars and for an order pursuant to Rule 16 F.R.C.P. for discovery of items described in the annexed motion and for such other and further relief including the right to move hereinafter for severance of the defendant's case and/or dismissal of the indictment or other relief which may seem

proper to the Court.

Dated New York, N. Y.
January 8, 1975

YOURS, etc.

ELEANOR JACKSON PIEL
Attorney for Defendant
James Reed
36 West 44 Street
New York, N.Y. 10036
(212) 682-8288

TO:

HON. PAUL J. CURRAN
U.S. Attorney
Southern District of New York
United States Courthouse
Foley Square
New York, N.Y. 10007

REMAND ORDER WITHOUT BAIL

REMAND

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	Crim. No. 74 CR 861 (RLC)
vs.	Title 21
DEFENDANT	Section 846
JAMES REED	Offense: narcotic violation
	(judge Carter's case)

PRESENT:

THE HONORABLE EDMUND L. PALMIERI

U.S. District Judge

2-14-75 Deft. found guilty by jury verdict. Deft. remanded. NO BAIL.

On the motion of the United States Attorney, bail is fixed in the sum of $ ~~[illegible]~~

ORDERED that the prisoner be remanded to the custody of the United States Marshall ~~[illegible]~~. No bail.

AN EXTRACT OF THE MINUTES

February 20, 1975

RAYMOND F. BURGHARDT
Clerk of the Court

By Susan Scognamillo
Deputy Clerk

JUDGMENT AND PROBATION/COMMITMENT ORDER

United States of America vs.

United States District Court for

DEFENDANT JAMES REED

DOCKET NO. 74 CRIMINAL 861

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date → MONTH: April DAY: 8th YEAR: 1975

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Eleanor Jackson Piel
(Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of
[ ] NOT GUILTY. Defendant is discharged
[X] GUILTY.

Defendant has been convicted as charged of the offense(s) of unlawfully, intentionally and knowingly did possess with intent to distribute, a Schedule II narcotic drug controlled substances.
(Title 21, United States Code, Sections 812, 841 (a) (1) and 841 (b) (1) (A).)

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

FIFTEEN (15) MONTHS

Pursuant to the provisions of Title 21, Section 841, United States Code, the defendant is placed on SPECIAL PAROLE for a period of THREE (3) YEARS to commence upon expiration of confinement.

SPECIAL CONDITIONS OF PROBATION

Judgment and Probation/Commitment Order

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

U.S. DISTRICT COURT FILED APR 8 1975 S. D. OF N. Y.

SIGNED BY

[X] U.S. District Judge

[ ] U.S. Magistrate

Edward Palmieri

Date April 8, 1975

By _____

MOTION FOR BILL OF PARTICULARS AND DISCOVERY

[Same Title]

Defendant James Reed moves this Court pursuant to the Federal Rules for an order pursuant to Rule 7 (f) and 16 F.R.C.P. for an order directing the United States Attorney for the Southern District of New York to serve and file a bill of particulars and make disclosure, particularly setting forth the following:

1. State where in the Southern District of New York and where else, the alleged conspirators agreed with each other to violate Section 812, 841 (a) (1) and 841 (b) (1) (A) of Title 21 U.S.C.

2. State the names and addresses of those other persons known to the grand jury to have participated in the conspiracy.

3. State every overt act performed by any conspirator and state what took place as to such act which the Government intends to prove at trial.

4. State whether the Government intends to offer into evidence any statement implicating the defendant, James Reed, made by a defendant or by an alleged co-conspirator whom the Government does not intend to call as a witness, and if so state (a) the name of the person who allegedly made the statement and (b) the contents of the statement allegedly made.

5. State whether the Government has in its possession or control any reports of any statements made by either the defendant James Reed or any co-conspirator during the period covered by the indictment or at any time.

6. State whether or not there was any electronic eavesdropping of any kind used by the Government in this case.

7. Permit the inspecting and copying of any relevant statement made by the defendant within the possession and control of the Government, the substance of any oral statement which the Government intends to offer in evidence at the trial whether before or after arrest in response to interrogation by any person then known to the defendant to be a Government agent, any testimony of any co-defendant or co-conspirator before a grand jury, the prior criminal record of the defendant and any co-conspirator; disclose a written list of the names and addresses of all Government witnesses which the Government intends to call in its case in chief together with the record of any prior felony convictions; all exculpatory material in the possession of the Government as required by Due Process of Law including material required by Brady v. Maryland, 373 U.S. 83 (1963).

Dated January 8, 1975

YOURS, etc.

ELEANOR JACKSON PIEL
Attorney for Defendant
James Reed
36 West 44 Street
New York, N.Y. 10036
(212) 682-8288

MEMORANDUM OF LAW IN SUPPORT OF MOTION
FOR BILL OF PARTICULARS AND DISCOVERY

[Same Title]

MEMORANDUM OF LAW IN SUPPORT OF MOTION
FOR BILL OF PARTICULARS AND DISCOVERY

Defendant, James Reed, invokes the provision of Rule 7 (f) and Rule 16 of the Federal Rules of Criminal Procedure in support of the within motion for a Bill of Particulars and for discovery.

His right to a Bill of Particulars is supported in United States v. Smith, 16 F.R.D. 372 (W.D. Mo 1954), United States v. Glase, 313 F.2d 757, 758 (2d Cir 1963), United States v. Wilson, 20 F.R.D. 569, 571 (S.D. N.Y. 1957), United States v. Covelli, 210 F. 589, 590 (N.D. Ill. 1962), and United States v. Corrado, 307 R.S. 513 (S.D. N.Y. 1969).

Defendant Reed further seeks discovery of his own statements and statements of co-conspirators and co-defendants in anticipation of problems having to do with Bruton v. United States, 391 U.S. 123 (1968), cf. United States v. Percevault, 490 F.2d (2 Cir. 1973).

Respectfully submitted,

ELEANOR JACKSON PIEL
Attorney for Defendant
James Reed

DEFENDANT'S EXHIBIT A FOR IDENTIFICATION
PRIOR TO TRIAL

Letter from Defendant's Counsel to Hon.
Robert L. Carter

January 31, 1975

Hon. Robert L. Carter
United States District Judge
Room 293
United States Courthouse
Foley Square
New York, New York 10007

Re: U.S.A. v. James Reed

Dear Judge Carter:

I have just returned from a conference with Mr. Richard Hoskins, the Assistant United States Attorney in the above entitled case. The conference concerned my motion for discovery in the case heretofore made and returnable on January 24, 1975.

There was certain discovery denied to me which I will be in a better position to protest when I receive certain additional information from Mr. Hoskins.

Among the information turned over to me was a statement of the defendant before arraignment which appears to show that the defendant was advised of his rights pursuant to Miranda and requested a lawyer.* Nonetheless the interrogation continued and he made certain admissions. This would seem to require a hearing before trial. Mr. Hoskins has told me he will not oppose my request for a hearing.

---

* A copy of the statement is appended to this letter.

I have previously written to you requesting that I be permitted to go to Albany on February 11, 1975 to argue an appeal in the New York Court of Appeals. Would it meet with your approval to have the Miranda hearing on February 10, 1975 and then commence the trial after February 11, 1975?

Sincerely yours,

Eleanor Jackson Piel

EJP/s
Enc.
cc: Mr. Richard Hoskins

DEFENDANT'S EXHIBIT B FOR IDENTIFICATION
PRIOR TO TRIAL

Government's Response to Defendant's Request for Bill of Particulars

Rec'd Feb 10, 1975

United States Department of Justice

ADDRESS REPLY TO "UNITED STATES ATTORNEY" AND REFER TO INITIALS AND NUMBER

RJH:emw

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, N. Y. 10007

February 6, 1975

Eleanor Jackson Piel, Esq.
36 West 44th Street
New York, New York 10036

Re: United States of America v. James Reed
74 Cr. 861

Dear Ms. Piel:

As we agreed at the conclusion of our meeting on January 30, I am sending this letter to memorialize the government's position with respect to your combined motion for bill of particulars and discovery dated January 8, 1975. The following numbers refer to the paragraph numbers in your motion.

1. The government does not know where the co-conspirators made their agreement.

2. Lucien Feldon, 26 East 60th Street, New York, New York.

3. The government does not believe that you are entitled under the law to this request.

4. The government does not believe that you are entitled under the law to this request, except as required by 18 U.S.C. §3500.

5. The government does not believe that you are entitled under the law to this request, except for the post-arrest admissions made by the defendant Reed, copies of which have been furnished to you.

6. There was no electronic eavesdropping by the government of the defendant Reed.

RJH:ets

7. (a) Defendant's statement to the government, in response to interrogation by a person known to him to be a government agent, has been furnished to the defendant. There was no testimony before a grand jury of a co-defendant or co-conspirator. The defendant's prior criminal record has been furnished; the criminal record of any co-conspirator will not be furnished, except that if a co-conspirator or any other witness with a criminal record testifies for the government, that record will be turned over prior to the beginning of his testimony.

(b) With respect to a list of witnesses, the government does not believe that you are entitled under the law to this information.

(c) The government will comply fully with its obligations under Brady v. Maryland, 373 U.S. 83 (1963).

Very truly yours,

PAUL J. CURRAN
United States Attorney

By: Richard J. Hoskins
RICHARD J. HOSKINS
Assistant United States Attorney

cc: Hon. Robert L. Carter
United States District Judge

DEFENDANT'S PRE-TRIAL EXHIBIT C FOR IDENTIFICATION
(GOVERNMENT'S EXHIBIT 1-A IN EVIDENCE)

Transcript of Electronic Surveillance

Feb 19, 1975
Meeting on telephone —
Concerned - subpoena

C1-74-0005

EXHIBIT ~~A~~ F

CONVERSATION BETWEEN SPECIAL AGENT SIMPSON AND JAMES REED. TRANSCRIBED BY SPECIAL AGENT SIMPSON.

TELEPHONE RINGING

JIMMY	Hello.
SA Simpson	Hello, Jimmy?
J	Yea.
SA S	Yea, this is Mike. What's happening?
J	Hey, what's going on?
SA S	Everything. Tell me, ah did you get it? Were you able to get in contact with those people?
J	Yea, ah, I went down last night to see him. Ah, I had to find out if you were interested in A or the whole?
SA S	The whole.
J	The whole thing?
SA S	Right.
J	What you were looking for.
SA S	Right.
J	Now I have to see what kind of price they talking.
SA S	uh huh.

J — Cause ah, I could give them know figures, cause I didn't know what you were looking for.

SA S — Right, well, now, I'm at my job, you know, now I like to do this thing around one if its possible, cause you told me last night, you got to tip some place around at 5:30 p.m., so I don't want to hold you up. But like my thing is, I just want to you know, go to the spot, ah, see the thing, I'll drop it on you, you know, and, ah, we get the thing, we do it that way.

Jimmy — Ah uh.

SA S — You know, long as I just see what I'm getting.

J — Right.

SA S — You know, and ah, I let you count the money, you know and we can talk on the street.

J — Ah, uh. Where you at now.

SA S — I'm at my job. You want my phone number?

J — Hey, wait a minute, cause I'll have to go, you know, ah, Okay, what is it?

SA S — five, eight, six

J — five, eight, six uh ah.

SA S — seven, one

J — Ah uh

SA S — Twenty eight.

J — Ah uh.

SA S — Now you got that?

J — Yeah.

SA S — five, eight, six, seventy one

J — twenty eight

SA S — twenty eight

J — ah um

SA S — Right.

J — Alright, so, ah, Yeah I call him, but they told me, ah, to call them early, but at two O'Clock would be, they would be there.

SA S — Oh, they be there at two O'Clock?

J — Yeah, and it would be there.

SA S — Okay now that's good

J — Well I call them right now.

SA S — Ah um.

J — And I'll get back to you in about ten minutes.

SA S — Okay, that's good. Beautiful.

J — Okay.

SA S — Right. Take it easy.

J — Ah um.

ABOUT TEN MINUTES LATER JIMMY CALLED BACK TO SA SIMPSON AND THIS IS WHAT TRANSPIRED.

SA S — Hello.

J — Hello, Mike?

SA S — Yeah.

J — Hey Jimmy, they had stepped out but their old lady said they would have them get back to me.

SA S — Okay.

J — Alright.

SA S — That's beautiful.

J — Okay then.

SA S — So, um, like if everything is everything we going to meet at the same place.

J — Ahhh, yeah. Ninety six.

SA S	Right and Park.
J	Right.
SA S	Okay, beautiful.
J	Ah um.
SA S	Okay now, I'll be waiting here for you, you know like I won't go to lunch or nothing.
J	Ah um.
SA S	You know, this way I can take about two hours lunch break or something.
J	Ah um, right.
SA S	Okay.
J	Okay.
SA S	Okay, I'll see you later.
J	Alright. But I'll call you first.

GOVERNMENT'S PRE-TRIAL EXHIBIT 3502 SUBMITTED
TO DEFENDANT BEFORE TRIAL

T 3502

Form No. USA 33s-306 p. 1
Rev. 10/28/71

Form 306

Reid 3502

STATEMENT OF DEFENDANT BEFORE ARRAIGNMENT
MADE TO ASSISTANT UNITED STATES ATTORNEY

Date: 11/19/74

Time Interview Commenced: _____ a.m. 2:05 p.m.

Q. My name is A-R-K, I am an Assistant United States Attorney. You have been arrested for a violation of 21 USC 846, 812, 841 and 841 which relates to violations of the narcotics laws In a few minutes you will be taken before the United States Magistrate who will fix bail in your case. Do you understand that?

A. Yes sir

Q. You have a constitutional right to refuse to answer any of my questions. Do you understand that?

A. Yes sir

Q. You have an absolute right to remain silent, and if you choose to answer any questions, any statement you do make can be used against you in a court of law. Do you understand that?

A. Yes sir

Q. You have a right to consult an attorney and to have that attorney present during this interview. Do you understand that?

A. Yes sir

Q. If you do not have funds to retain an attorney an attorney will be appointed to represent you and you do not have to answer any questions before this attorney is appointed and you can consult with him. Do you understand that?

A. Yes sir - needs appointed lawyer

Q. Understanding your rights as I have explained them, do you want to give me some information at this time about your background and your version of the facts?

A.

Form No. USA 33s-306 p.2
Rev. [illegible]-28-66

Name: James [illegible] Reed

Marital Status: married ? separated from legal wife ?

Age: 30
DOB - 12/31/43

Aliases: —

Children: 2

Other Dependents:

Address: 212 Madison Ave.
NY, NY

Apt. No. 11B

Rent:

Period: [illegible] Had been w/ mother in Beckley, W.V.

With Whom Residing: mother-in-law (mother of common-law wife)

Citizen of: US

~~Registered as an Alien~~: Educ. - 9th grade

~~Entry to U.S.~~

Registered with Selective Service
Military Service, Discharge:

SSN 233-46-9217

Employed: drive a cab
Day-Night Car Service
79th & Amsterdam

Wages: $150/wk.

Previous Record:
1970 - possession of stolen car & conspiracy to commit robbery - Probation - Bronx

Government's Pre-Trial Exhibit 3502 Submitted
to Defendant before Trial

Addict:

No.

Defendant's Statement:

Last night I negotiated to sell a 1/4 kilo to a black guy. Was going to get the cocain from people at the carpet place at 97th St and Park Ave. (R & O (carpet). Guy I was dealing with there was named "Red," who was a black guy. The sale fell through because I left town to go to West Virginia.

rm No. U.S.A. 33s-306 p.3
Rev. 6-28-66

Defendant's Statement continued:

Government's Pre-Trial Exhibit 3502 Submitted to Defendant before Trial

Time Interview Terminated:________ a.m. 2:30 p.m.

Witnessed: Assistant U.S. Attorney [signature]

Agents: [signature] S/A DEA 11/19/74 971 5064

MEALE [signature] S/A DEA 11/19/74

Bail recommended: $10,000 P.R.B. agreed for by S/A [illegible] is [illegible] opposed

Possible bail suggested by defendant:

Bail set by Magistrate: $10,000 PRB

Time of arraignment:________ a.m. 3:10 p.m.

Hearing:

December 9, 1974, unless Δ has already been indicted.

Appointed Counsel
Eleanor Piel
36 W. 44th St.
MU 2-8288

QUESTIONS TO BE ASKED OF PROSPECTIVE JURORS
AS REQUESTED BY DEFENDANT JAMES REED

[Same Title]

QUESTIONS TO BE ASKED OF PROSPECTIVE JURORS AS REQUESTED BY DEFENDANT JAMES REED

1. Has any member of your family, close friend or acquaintance ever been connected with drugs or drug addiction in any way? Alcohol?
2. Has any member of your family, close friend or acquaintance any relationship of any kind with a law enforcement agency such as the police, F.B.I., military police etc.?
3. Have you ever had any legal training of any kind?
4. In weighing the testimony of a witness--any witness--will you use your own common sense and consider whether or not there is any motive which might induce such witness to testify untruthfully rather than truthfully or to exaggerate and will you use your common sense in making such a decision?
5. Have any one of you in the course of your lives had any unpleasant experience with either an individual of a group of persons different from your own racial group.--With Blacks?
6. Have any of you ever belonged to any organization, labor union, tenants group or body of any kind which was involved in a racial dispute? If so what was the nature of the dispute? When did it take place?

Questions to be Asked of Prospective Jurors
as Requested by Defendant James Reed

7. To be asked of each juror:

1) County and place of residence, marital status

2) Have you lived any part of your life out of New York, in another country?

3) What is your educational background?

4) Where are you now employed or were employed if retired?

5) What is the nature of your occupation?

6) Does your spouse have an occupation? What is it?

7) Children? Are they employed? Where?

Respectfully submitted,

ELEANOR JACKSON PIEL
Attorney for Defendant.

DEFENDANT'S EXHIBIT E FOR IDENTIFICATION

Defendant's Proposed Instructions for Jury

DEFENDANT'S PROPOSED INSTRUCTIONS FOR JURY

(1.)

§ 12.10 Effect of Failure of Accused to Testify

The law does not compel a defendant in a criminal case to take the witness stand and testify, and no presumption of guilt may be raised, and no inference of any kind may be drawn, from the failure of a defendant to testify.

As stated before, the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

NOTES

Cf. Crim. Jury Instr. D.C. No. 22.

Holland v. United States, 348 U.S. 121, 138-139, 75 S.Ct. 127, 136-137, 99 L.Ed. 150 (1954); Wilson v. United States, 149 U.S. 60, 65-66, 13 S.Ct. 765, 766, 37 L.Ed. 650 (1893); Crumpton v. United States, 138 U.S. 361, 364, 11 S.Ct. 355, 356, 34 L.Ed. 958 (1891); Dickey v. United States, 332 F.2d 773 (9th Cir. 1964);

(2.)

§ 12.05 Impeachment—Inconsistent Statements or Conduct—Falsus in Uno Falsus in Omnibus

The testimony of a witness may be discredited or impeached by showing that he previously made statements which are inconsistent with his present testimony. The earlier contradictory statements are admissible only to impeach the credibility of the witness, and not to establish the truth of these statements. It is the province of the jury to determine the credibility, if any, to be given the testimony of a witness who has been impeached.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

An act or omission is "knowingly" done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

NOTES

See: United States v. Kahn, 381 F.2d 824, 835-836 (7th Cir. 1967), cert. denied 389 U.S. 1015, 88 S.Ct. 591, 19 L.Ed.2d 661,

(3)

§ 12.17 Not Required to Accept Uncontradicted Testimony

You are not obliged to accept testimony, even though the testimony is uncontradicted and the witness is not impeached. You may decide, because of the witness's bearing and demeanor, or because of the inherent improbability of his testimony, or for other reasons sufficient to you, that such testimony is not worthy of belief.

(On the other hand, the government is not required to prove the essential elements of the offense as defined in these instructions by any particular number of witnesses. The testimony of a single witness may be sufficient to convince you beyond reasonable doubt of the existence of an essential element of the offense charged, if you believe beyond reasonable doubt that the witness is telling the truth.)

NOTES

See Yates v. United States, 407 F.2d 50 (1st Cir. 1969), cert. denied 395 U.S. 925, 89 S.Ct. 1781, 23 L.Ed.2d 242, holding that the jury is permitted to find that public officials have performed their duties according to law, but is not compelled to do so.

See United States v. Manuszak, 231 F.2d 421, 424 (3d Cir. 1956).

The second paragraph should be used only where appropriate and of course should not be used in cases in which additional requirements on the volume of evidence are imposed. See Chapter 60 on Treason, and § 47.06 on perjury.

Allison v. United States, 133 U.S.App.D.C. 159, 409 F.2d 445 (1969), expounds the rule that a defendant may not be convicted of a "sex offense" on the uncorroborated testimony of the victim.

---

(4)

§ 13.13 "Unlawful Entrapment"—Defined

The defendant asserts that he was a victim of entrapment as to the crime charged in the indictment.

Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents to commit a crime, he is a victim of entrapment, and the law as a matter of policy forbids his conviction in such a case.

On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that Government agents provide what appears to be a favorable opportunity is not entrapment. For example, when the Government suspects that a person is engaged in the illicit sale of narcotics, it is not entrapment for a Government agent to pretend to be someone else and to offer, either directly or through an informer or other decoy, to purchase narcotics from such suspected person.

If, then, the jury should find beyond a reasonable doubt from the evidence in the case that, before anything at all occurred respecting the alleged offense involved in this case, the defendant was ready and willing to commit crimes such as charged in the indictment, whenever

(5)

opportunity was afforded, and that Government officers or their agents did no more than offer the opportunity, then the jury should find that the defendant is not a victim of entrapment.

On the other hand, if the evidence in the case should leave you with a reasonable doubt whether the defendant had the previous intent or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some officer or agent of the Government, then it is your duty to acquit him.

NOTES

Last two paragraphs quoted and approved, Eisenhardt v. United States, 406 F.2d 419, (5th Cir. 1969); Lopez v. United States, 373 U.S. 427, 433, 83 S.Ct. 1381, 1384, 10 L.Ed.2d 462 (1963); Sherman v. United States, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958); Masciale v. United States, 356 U.S. 386, 78 S.Ct. 827, 2 L.Ed.2d 859 (1958), reh. denied 357 U.S. 933, 78 S.Ct. 1367, 2 L.Ed.2d 1375 (1958); Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413, 86 A.L.R. 249 (1935).

(6)

§ 29.05 Membership in Conspiracy—Proof of

One may become a member of a conspiracy without full knowledge of all the details of the conspiracy. On the other hand, a person who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator.

Before the jury may find that a defendant, or any other person, has become a member of a conspiracy, the evidence in the case must show beyond a reasonable doubt that the conspiracy was knowingly formed, and that the defendant, or other person who is claimed to have been a member, willfully participated in the unlawful plan, with the intent to advance or further some object or purpose of the conspiracy.

To act or participate willfully means to act or participate voluntarily and intentionally, and with specific intent to do something the law forbids, or with specific intent to fail to do something the law requires to be done; that is to say, to act or participate with the bad purpose either to disobey or to disregard the law. So, if a defendant, or any other person, with understanding of the unlawful character of a plan, knowingly encourages, advises or assists, for the purpose of furthering the undertaking or scheme, he thereby becomes a willful participant—a conspirator.

One who willfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy.

In determining whether a conspiracy existed, the jury should consider the actions and declarations of all of the alleged participants. However, in determining whether a particular defendant was a member of the conspiracy, if any, the jury should consider only his acts and statements. He cannot be bound by the acts or declarations of other participants until it is established that a conspiracy existed, and that he was one of its members.

NOTES

LaBuy, Sec. 10.00.

United States v. Aiken, 373 F.2d 294 (2d Cir. 1967), cert. denied 389 U.S. 833, 88 S.Ct. 32, 19 L.Ed.2d 93; United States v. Nuccio, 373 F.2d 168 (2d Cir. 1967), cert. denied 387 U.S. 906, 87 S.Ct. 1688, 18 L.Ed.2d 623, reh. denied 389 U.S. 889, 88 S.Ct. 16, 19 L.Ed.2d 199; United States v. Chase, 372 F.2d 453 (4th Cir. 1967), cert. denied 387 U.S. 907, 87 S.Ct. 1688, 18 L.Ed.2d 626; Nassif v. United States, 370 F.2d 147 (8th Cir. 1967); United States v. Hoffa, 367 F.2d 698, 706-707 (7th Cir. 1966), vacated and remanded on other grounds, 387 U.S. 231, 87 S.Ct. 1583, 18 L.Ed.2d 738 (1967); United States v. Edwards, 366 F.2d 853, 867

(2d Cir. 1966), cert. denied 386 U.S. 908, 87 S.Ct. 852, 17 L.Ed.2d 782 (1967); United States v. Kahn, 366 F.2d 259 (2d Cir.), cert. denied 385 U.S. 948, 87 S.Ct. 324, 17 L.Ed.2d 26; United States v. Hickey, 360 F.2d 127 (7th Cir. 1966), cert. denied 385 U.S. 928, 87 S.Ct. 284, 17 L.Ed.2d 210; Koolish v. United States, 340 F.2d 513, 525, (8th Cir. 1965), cert. denied 381 U.S. 951, 85 S.Ct. 1805, 14 L.Ed.2d 724; Mount v. United States, 333 F.2d 39 (5th Cir. 1964), cert. denied 379 U.S. 900, 85 S.Ct. 188, 13 L.Ed.2d 175; United States v. Allegretti, 340 F.2d 243, 248 ff., reh. 340 F.2d 254

(7)

§ 29.08 Essential Elements of Offense—When Conspiracy Offense Complete

Four essential elements are required to be proved in order to establish the offense of conspiracy charged in the indictment:

First: That the conspiracy described in the indictment was willfully formed, and was existing at or about the time alleged;

Second: That the accused willfully became a member of the conspiracy;

Third: That one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment, at or about the time and place alleged; and

Fourth: That such overt act was knowingly done in furtherance of some object or purpose of the conspiracy, ~~as~~ charged.

If the jury should find beyond a reasonable doubt from the evidence in the case that existence of the conspiracy charged in the indictment has been proved, and that during the existence of the conspiracy one of the overt acts alleged was knowingly done by one of the conspirators in furtherance of some object or purpose of the conspiracy, then proof of the conspiracy offense charged is complete; and it is complete as to every person found by the jury to have been willfully a member of the conspiracy at the time the overt act was committed, regardless of which of the conspirators did the overt act.

As stated before, the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged; the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Ingram v U.S. 360 U S ('1959)
U.S. v Valeone 311 U.S. 205

(8)

The gist of the offense of conspiracy as defined by ~~§37 of the Criminal Code, 18 U. S. C. §88,~~ the law is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy. *Pettibone* v. *United States*, ~~148 U. S.~~ 197; *Marino* v. *United States*, *supra*; *Troutman* v. *United States*, ~~109 F. 2d 628; *Beland* v. *United States*, 100 F.~~ 2d 289; cf. *Gebardi* v. *United States*, ~~supra.~~ Those having no knowledge of the conspiracy are not conspirators, ~~*United States* v. *Hirsch*, 100 U. S. 33, 34; *Weniger* v. *United States*, 47 F. 2d 692, 693;~~ and one who

or agrees to procure cocaine is

without more furnishes ~~supplies to an illicit distiller is~~ not guilty of conspiracy even though his sale may ~~have furthered~~ the object of a conspiracy to which ~~the distiller was a party~~ but of which ~~the supplier~~ had no knowledge. ~~On this record we have no occasion to decide any other question.~~

knew about

one party

another party

210, 211

U.S. v Falcone 311 U.S. 205 (1940

(9)

The offence charged in the counts of this indictment is a conspiracy. This offence does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there

> must be an act done to effect the object of the conspiracy, merely affords a *locus penitentiæ*, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute.

U.S. v Britton 108 U.S. 199, 204, 205, (1883)

(10) "You are instructed that participation in a single narcotics transaction may be insufficient to warrant a conviction for conspiracy. There must be independent evidence tending to prove that the defendant had some knowledge of the broader conspiracy and [~~taken into~~ a] single transaction is not in itself one from which such knowledge might be inferred. . . . since conviction of conspiracy requires an intent to participate in the unlawful enterprise, the single act must be such that one may reasonably infer from it such an intent."

from U.S. v Agueci
310 Fed 2d 817 (2 Cir 1962)
cert den 372 U.S. 959 (1963)

(11) Even if you find there was a conspiracy and the defendant had knowledge of its purpose, if you find the defendant withdrew from such conspiracy and communicated such withdrawal to others in the conspiracy, you must acquit him of the charge.

U.S. v Hyde 255 U.S. 347 (1917)

(12)

You are instructed that ~~that~~ knowledge of the existence and goals of a conspiracy does not of itself make one a coconspirator. There must be something more than "[m]ere knowledge, approval of or acquiescence in the object or the purpose of the conspiracy * * *." ~~Cleaver v. United States, 338 F.2d 700, 771 (10th Cir. 1964).~~ This "something more" is generally described as a "stake in the venture." "[I]n prosecutions for conspiracy * * * [the defendant's] attitude towards the forbidden undertaking must be more positive. * * * he must in some sense promote their venture himself, make it his own, have a stake in its outcome." United States v. Falcone, 109 F.2d 579, 581 (2d Cir.), aff'd, 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128 (1940). See United States v. Tramaglino, 197 F.2d 928 (2d Cir., 1952)

from U.S. v Cianchetti 315 F2d 584 (2 Cir 1963)

(13)

§ 29.08 INSTRUCTIONS—SPECIFIC CRIMES Part 3

A conspirator who withdraws before the commission of an overt act may not be convicted. United States v. Heckman, 479 F.2d 726 (3d Cir. 1973).

(14)

The government must prove the conspiracy charged, and not some other conspiracy. United States v. Bostic, 480 F.2d 965 (6th Cir. 1973).

RESPECTFULLY SUBMITTED

Eleanor Jackson Piel

POST-TRIAL MOTION FOR ACQUITTAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

74 Cr. 861

- v -

JAMES REED,

Defendant.

----------x

Defendant, James Reed, will move the court pursuant to Rules 29 and 33 F.R.C.P. on April 8, 1975 for a new trial in the interests of justice and/or a judgment of acquittal notwithstanding a verdict of guilty.

Dated: New York, New York
April 7, 1975

YOURS,

ELEANOR JACKSON PIEL
Attorney for James Reed

TO: PAUL J. CURRAN
U.S. Attorney
Southern District of New York
U.S. Courthouse
FoleySquare
New York, New York 10007

AFFIDAVIT OF ELEANOR JACKSON PIEL IN SUPPORT OF MOTION FOR ACQUITTAL

[Same Title]

State of New York)
: ss.:
County of New York)

ELEANOR JACKSON PIEL, being duly sworn, deposes and says:

1. I am the attorney for James Reed, the defendant, herein, and make this affidavit in support of defendant's motion under FRCP Rule 29 and 33 for a judgment of acquittal and/or a new trial in the interests of justice based on the following errors and/or miscarriages of justice which took place at the trial and before:

2. I am incorporating in this affidavit both my summary of the facts and the law which I believe supports those facts. At the time of the jury verdict of guilty on February 14, 1975, I indicated to the Court that I would make these motions and the Court gave me leave to make them on the date of sentence now scheduled for April 8, 1975.

3. The Court further ordered that I receive a transcript of the proceedings. To date, however, none has been made available to me and accordingly this affidavit is based completely on

my information, belief and memory of what has gone before.

4. The defendant was indicted for one count of conspiracy (21 U.S.C. §846) to violate the narcotics laws of the United States to conspire to knowingly possess with intent to distribute a narcotic drug controlled substance.

5. The defendant urges the following errors which deprived him of a fair trial and which mandate either an acquittal by this Court or a new trial.

a) On January 8, 1975, defendant filed a request a bill of particulars which was never ruled on by the court. On January 30, 1975, counsel had an interview in connection with the Bill of Particulars with Mr. Richard J. Hoskins, an assistant United States Attorney representing the government. At that time Mr. Hoskins turned over to defense counsel a statement of defendant (Form 306 Numbered 3502) and stated to defense counsel that this was the only statement of defendant in the case. There was no other statement of any kind nor was there any electronic surveillance. This contention was later confirmed by letter from Mr. Hoskins to me.

On February 10, 1975, the day the case was scheduled to go to trial, Mr. Harry C. Batchelder, Jr., the new assistant United States Attorney in charge of the case, advised the undersigned that there was electronic surveillance and a tape of a conversation of a government agent and the defendant taken on February 19, 1974 (Exhibit C). Defendant's counsel protested

this and requested an adjournment. A hearing was then held on the voluntariness of the statement reflected in form 306 and the matter was put over until February 13, 1975 when trial commenced over defendant's objection that counsel needed more time to prepare in view of the government's seriously misleading counsel on material facts.

b) At the hearing on the voluntariness of the confession, defense counsel argued that all the statements recorded and made to law enforcement agents on that day should be suppressed because of the entry on the form concerning whether the defendant understood that he had a right to an attorney to represent him and that he did not have to answer any questions before this attorney is appointed. Written on the form in answer to questions was:

"Yes sir - needs appointed lawyer"

The next question asking whether the defendant wished to give information was left blank and no where on the form was there any indication that the defendant had knowingly waived his rights under Miranda (Miranda v. Arizona, 384 U.S. 436 [1966]). At the hearing the Court asked its own questions of the witness who testified he had taken the defendant's statement and filled out the form. The witness had stated on cross-examination by defense counsel that the defendant had not in so many words "waived" his right to counsel. Nonetheless the Court, over the objection of defense counsel, intervened to query the witness as to what he "usually" did in questioning a suspect.

Thereafter the Court held that the statement was voluntary and not barred from use in evidence under Miranda. Defendant submits this was an error and that the statement was tainted and should have been barred from evidence because there was no showing in the record that defendant who was in custody and being interrogated by law enforcement officials had knowingly waived his right to consult with counsel before he gave his statement. In fact all of the evidence was to the contrary.

c) Prior to trial, defense counsel submitted a list of proposed questions to be asked of prospective jurors. The list of questions is attached to this affidavit and marked "Exhibit A". Defendant urges upon this Court that it was reversible error for the Court to refuse to ask the prospective jurors any questions along the line of proposed questions 5 and 6 having to do with any possible race prejudice the jurors might have had which would not be otherwise known to the defendant or his counsel. Although it was pointed out to the Court that the failure to question the jury along these lines involved a constitutional right, the Court nonetheless refused to make the inquiry. The Court will recall that the defendant was black and that the majority of the prospective panel was Caucasian.

In Ham v. South Carolina 409 U.S. 524, 527 (1973) this precise issue was raised and the Supreme Court held that it was reversible error presenting the deprivation of a constitutional right in a state court proceeding to refuse defense

counsel this kind of inquiry to determine prejudice. Said the Court:

> "...the essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that the petitioner be permitted to have the jurors interrogated on the issue of racial bias. cf. Groppi v. Wisconsin 400 U.S. 505, 508...(1971); Bell v. Burson 402 U.S. 535, 541...(1971).

Under the facts of the case at bar, the defendant was denied his constitutional right and if this Court does not acquit and/or grant a new trial the judgment of conviction must be reversed because of the denial of a basic right of fair trial.

d) It was error of the Court to rule that the government could use a five year old prior conviction based on a charge of conspiracy to commit robbery, possession of a weapon, grand larceny of an automobile, possession of a stolen automobile and unauthorized use of an automobile. Under the so-called Palumbo rule (U.S.A. v. Palumbo 401 F 2d. 270 (2 Cir. 1968) cert. den. 394 U.S. 947 (1967) the Court of Appeals for this Circuit held that a trial judge has the power in the exercise of sound discretion, to make an advance ruling prohibiting the use of a prior conviction for impeachment of a defendant if he finds that a prior conviction negates credibility only slightly but creates a substantial change of unfair prejudice, taking into account such factors as the nature of the conviction, its bearing on veracity, its age, and its propensity to influence the minds of the jurors improperly" cf. U.S.A.

v. Puco 453 F. 2d 539, 541 (2 Civ. 1971)

e) There was error by the Court in refusing to give the instructions requested by defendant (see Defendant's Exhibit E) -- particularly the instruction concerning entrapment (Exhibit E No. 4), the government must prove the conspiracy charged, and not some other conspiracy (Exhibit E No. 14) and that a person who withdraws from a conspiracy befcre the commission of an overt act may not be convicted. (Exhibit E No. 13).

f) Finally the evidence altogether on the issue of the defendant's guilt was insubstantial and insufficient for the conviction of the felony of conspiracy. In essence the government's case was predicated on talk and not action. There was no evidence that the defendant actually intended to perform and follow through on any illegal act and in fact he did not do so although afforded every opportunity.

CONCLUSION

Based upon the foregoing, this Court should grant defendant's motion for an acquittal and/or a new trial.

Sworn to before me this
8 day of April, 1975

ELEANOR JACKSON PIEL
Attorney for Defendant

MARY E. EDMONDSON
Notary Public, State of New York
No. 31-4777[illegible]
Qualified in Queens County
Commission Expires March 30, 1977

COURT'S CHARGE TO THE JURY

(Following pages)

US v. Reed. Judge Palmieri's Charge.

28

CHARGE OF THE COURT

THE COURT: Ladies and gentlemen of the jury, first of all, let me add my own thanks to the thanks of the attorneys for the careful attention which you paid throughout this trial. It was very gratifying to me to see that you were following the evidence very carefully and that is as it should be. I want to thank the attorneys as well. They are careful, aggressive, able attorneys. Each one of them has attempted to represent his respective client in a proper and complete and able way, and that is the way it should be. Our adversary system is based on the aggressive representation of clients, and I have no quarrel whatever with them, and I hope that we may have the pleasure of working together on other cases in the future.

Now, remember that our personalities account for nothing. What we have done is to place the evidence before you. I have the responsibility of explaining the applicable law, and then we will have substantially performed all of our functions in the case. You are left with the stupendous responsibility of passing upon this evidence under the law as I charge you and deciding what your verdicts shall be.

If during the course of my charge I refer to any facts, please remember that I am not finding facts for you. If I refer to evidence in a way that you think is inaccurate,

you should rely upon your recollection to the exclusion of my own, and you should rely upon your recollection to the exclusion of the recollection of the attorneys as well. It is your recollection that counts to the exclusion of their recollection, as well as mine. But remember that you are entitled to refer to the testimony if you wish to; you can play that cassette. There are only two exhibits in the case: The recording of the telephone conversation between Simpson and the defendant, according to his testimony, and then the transcript. You can have them in the jury room and you can be supplied with the tape player that will permit you to hear that if you want to. You don't have to look at the transcript and you don't have to play the cassette if you don't want to.

You will also have a copy of the indictment, which I hasten to add is not an exhibit, it is merely a procedural device for putting the defendant on notice of what the charge is. But in order to help you understand in the performance of your functions, you will get a copy of the indictment.

If I refer to any facts or conclusions which I suggest you should come to, remember that I am only expressing a respectful opinion; I am not directing you to come to any conclusion whatever.

I have great respect for jury verdicts; I leave

this stupendous responsibility where it belongs, in the hands of the jury, and the jury alone. You are the sole triers of the facts; I am not a trier of the facts, and I have no intention of intruding upon or controlling your exclusive discretion with respect to your conclusion of the factual issues in the case.

As I have told you before, you must decide the case not on speculation, not on surmise, not on guess work, but on the evidence that has been presented before you, and the evidence consists of testimony you have heard, it consists of the exhibits placed in evidence. Any concessions and stipulations that have been made by counsel, they, too, will be part of the record.

Since this is a criminal case, the burden of proof rests upon the Government and never shifts to the defendant. It is the Government which has the burden of proving a defendant guilty beyond a reasonable doubt, and the defendant is presumed to be innocent throughout the trial and throughout your deliberations, until such time, if that time ever comes, when the presumption of his innocence is overcome by proof of his guilt beyond a reasonable doubt.

What do we mean by a reasonable doubt? It is important for you to know that, because you may not find the

defendant guilty if you have a reasonable doubt about any of the facts necessary to constitute the crime. Reasonable doubt may be based upon the evidence or the lack of evidence in the case. A reasonable doubt is such a doubt as would cause a reasonable man to hesitate in the more serious and important affairs of life; it is a doubt which a reasonable person has after carefully weighing all the evidence. Reasonable doubt is one which appeals to your reason, your judgment, your common sense, and your experience.

Beyond a reasonable doubt does not mean to a mathematical certainty or beyond all possible doubt. Reasonable doubt is not caprice, whim or speculation; it is not an excuse to avoid the performance of an unpleasant duty; it is not sympathy for a defendant. Vague, speculative, or imaginary qualms or misgivings are not reasonable doubts.

If, after a fair, impartial and careful consideration of all the evidence you are convinced of the guilt of the defendant, you must convict him. If, on the other hand, after such a fair, impartial and careful consideration of all the evidence, you doubt the defendant's guilt, you must acquit him.

Now, the indictment which I am about to read you mentions not only the defendant James Reed, it also mentions Gerald Michael Hardy, who is not on trial. He has been men-

tioned during the course of the testimony of the agents. He is not here and he has not testified. Please, ladies and gentlemen, do not discuss any possible reasons for his absence; do not discuss the possible testimony of Hardy. It just is something that is not before you; it is not there. What you have to do is to look at the evidence that is before you. Your job is a little bit like that of an ancient picture restorer, and you know the skills and great patience that these men have to use in order to restore an ancient painting, to scrape away and remove the dust and the grime, possibly of centuries, and sometimes when they are through with their work they have a picture which brings out the great work of the artist, and sometimes when they are through they have just a jumble, part of a landscape, part of something else, something which does not correspond to the purpose of the artist.

29 Now, sifting through facts and attempting to ascertain their significance is sometimes like the work of these skilled picture restorers, you can't get angry at the result; you have to accept the result. But what you must do is be as patient and as careful as any picture restorer.

All of the evidence in the case tended to point out or to illuminate certain events which took place in February, 1974, just about a year ago. They are like a lot

of searchlights, all pointing at the same time to the same place, the same people, each one giving you an insight as to what happened, who was there, what was said. And you have to ask yourselves with respect to all of this testimony: What does it mean? What was intended by what was said? What significance should I attach to this or to that? This fact that I accept as true, what does it mean?

Now, one of the precious gifts that you bring to the courtroom is the capacity to make a judgment with respect to other people, with respect to human affairs. Why are you called from your homes and your work, taken at random, as you are, to come to a courtroom to listen to evidence and then retire to tell us what the truth is and what the significance of that truth is? The precious gift is your experience; the precious gift is the sum total of all the joys and sorrows that you lived through, all the important decisions that you had to make in your life, perhaps some very serious crisis that you have lived through. You, as a result of all that, have been able to form a sense of judgment, a sense of discernment, and that is what you bring to us, like a fresh breath of air in the courtroom. That judgment is the precious gift that you bring to us.

Now, words don't always have their dictionary meaning. You know that, as well as I. "I love you" can be

used as an expression of hatred; "I hate you" can be used as an expression of love. The facts, the surrounding circumstances, the tone, the participants, all of the things that affect the utterance of words will weigh in the balance in leading you to one conclusion or another as to just what was meant. The words, "Where is the baby"? A perfectly innocent sentence, a very short sentence with a question mark at the end. But let us put it into two settings: A doctor arriving at three o'clock in the morning at the home of a distraught mother who has a sick child, "Where is the baby"? Then just change it a little bit to somebody with a ski mask, who is unknown to the mother, someone with a revolver in his hand, and he asks the same question, "Where is the baby"? You can see that there are many instances where the use of words must be judged against the background as you find it, against the participants, their intentions; you have to take all these into consideration when you accept the testimony, if you accept the testimony, look at them carefully, weigh them, consider them, and determine what was intended, what was meant by those who participated.

Let me read the indictment. It says:

"From on or about the first day of January, 1974 and continuously thereafter up to and including the date of

filing of this indictment, in the Southern District of New York, Gerald Michael Hardy and James Reed, the defendants, and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A)of Title 21, United States Code.

It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown and in violations of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

Then there is a list of overt acts. I won't take the trouble to read them now, because I prefer to do that when I define what we mean by overt acts.

Let me stress one or two things preliminarily about the charge. The charge is that the defendant was a member of a conspiracy which was engaged in the unlawful commerce of dealing in cocaine; in other words, that they were conspiring to distribute and possess, to negotiate with intent to distribute and possess a certain narcotic drug, namely, cocaine, which is one of the controlled sub-

stances controlled by law, and dealings in which are unlawful.

Now, you were told that this indictment talks about certain dates, "From on or about the first day of January, 1974, and continuously thereafter up to and including the date of the filing of this indictment." Those words have no special significance, ladies and gentlemen. The Government is entitled to prove that the conspiracy lasted for any period of time during that period; in other words, the indictment can allege the twelve months and the Government can prove just a few days. As a matter of fact, in this case the evidence indicated that nearly all the occurrences which took place, took place during a short span of days during the month of February, 1974, and if you accept the Government's evidence, that is sufficient proof of the allegations of the indictment. These allegations with respect to dates do not compel the Government to prove the precise dates which are therein set forth. Proof of a period within the time alleged is sufficient.

The indictment charges the defendant with violations of the Federal Narcotics Laws. The Comprehensive Drug Abuse Prevention Act of 1970 was passed by Congress because of a concern with the illegal importation and distribution of narcotic drugs which have a substantial and

detrimental effect on the health and welfare of our people. The part of this Act which is applicable to the charge here is called the Controlled Substances Act which became effective on May 1, 1971. It is not necessary for you to remember the names of the Acts or their applicable parts. It is sufficient if you remember the conduct the Acts forbid and the essential elements of the offenses here charged.

The term "controlled substances" is used in the Act to refer to any drug included in one of five schedules contained in the Controlled Substances Act. Cocaine is included in Schedule II. Among other things, it is made unlawful for any person knowingly or intentionally to conspire to distribute or possess with intent to distribute any controlled substances, such as cocaine.

The indictment charges that the defendant conspired with Gerald Michael Hardy to violate Section 841 of Title 21, United States Code. In order to find the defendant guilty of conspiracy as charged in the first count of the indictment, you must find beyond a reasonable doubt:

First, that sometime between January 1, 1974 and the date of the filing of this indictment an agreement existed between the two co-conspirators named in the indictment. In this connection you are not to be influenced one way or the other by the fact that Gerald Michael Hardy is

not on trial at this time. Suffice to say that your task is the same as far as the defendant James Reed is concerned, regardless of whether Gerald Michael Hardy is tried with him or not.

The second essential element is that it was part of this agreement either to distribute or possess with intent to distribute Schedule II narcotic drug controlled substances. In this connection you are instructed that cocaine hydrochloride is such a substance. And you would be entitled to conclude, if you accept the testimony of Simpson, that the parties were dealing and intended to deal in cocaine.

Third, that the defendant on trial, James Reed, knowingly and intentionally associated himself with the conspiracy.

Fourth, that one of the conspirators knowingly committed at least one of the overt acts set forth in the indictment, or at or about the time and place alleged.

Now, what is a conspiracy? The term conspiracy comes from two Latin words, "con" and "spirare", meaning with and to breathe -- to greathe together. A conspiracy is a combination or agreement, of two or more persons, by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or

unlawful means.

The success or failure of a conspiracy is not of any importance. A person can be guilty of a conspiracy that fails, just as he can be guilty of a conspiracy that succeeds. The gist of the crime of conspiracy is the unlawful combination or agreement to violate the law. Whether or not the defendants accomplished what it is alleged they conspired to do, is immaterial to the question of guilt or innocence.

A conspiracy, which sometimes is referred to as a partnership in crime because it involves collective or organized action, presents a greater potential threat to the public interest than the illicit activity of a single individual. Group association or organized activity renders detection more difficult than in the instance of a single or lone wrong doer. It was for these and other reasons that Congress made a conspiracy or concerted action to violate a Federal law, a crime -- entirely separate and distinct and different from violation of the law or laws which may be the objective of the conspiracy.

Thus, Congress has enacted special laws which provide that any person who conspires to violate the Drug Abuse Prevention and Control Act, the law which is the subject of the substantive count, shall be guilty of a

separate crime.

To establish a conspiracy, the Government is not required to show that two or more persons sat around a table and entered into a solemn compact orally or in writing, stating that they have formed a conspiracy to violate the law, setting forth details of the plans, the means by which the unlawful project is to be carried out, or the part to be played by each conspirator. Indeed, it would be extraordinary if there were such a formal document or specific oral agreement.

Your common sense will tell you that when men and women, in fact, undertake to enter into a criminal conspiracy, much is left to unexpressed understanding. Conspirators do not usually reduce their agreements to writing or acknowledge them before a Notary Public, nor do they publicly broadcast their plans. From its very nature, a conspiracy is almost always characterized by secrecy, rendering detection difficult.

Thus, it is sufficient if two or more persons, in any manner, through any contrivance, impliedly or tacitly, come to a common understanding to violate the law. Express language or specific words are not required to indicate assent or attachment to a conspiracy.

In determining whether there has been an unlawful

agreement, you may judge acts and conduct of the alleged members of the conspiracy which are done to carry out an apparent criminal purpose. The addage, "Actions speak louder than words" is applicable here. Usually, the only evidence available is that of disconnected acts on the part of the alleged individual conspirators, which acts, however, when taken together in connection with each other and with the reasonable inferences flowing therefrom, show a conspiracy or agreement to secure a particular result as satisfactorily and conclusively as more direct proof.

31 I should also point out to you that just as with any other component of a crime, the existence of and dealing with narcotics may be approved by circumstantial evidence; there need be no sample placed before the jury, nor need there be testimony by chemists as long as the evidence furnishes a basis for inferring that the material in question was narcotics. Here, you will recall the testimony about the sample of cocaine that occurred during the testimony of Agent Simpson when he was at 26 East 60th Street, where the first talks occurred, at a time when the defendant was not there, and a reference was made to a sample that was shown that looked good, according to Simpson, and later on there was a reference to a conversation with the defendant up near 96th Street and Park Avenue, after these people at

60th Street had a conversation about introducing Simpson to the source of their supply, and a conversation about not being able to produce the cocaine at the same time as the money. You remember the running conversations indicate that the proposal made at 60th Street was to pay out the $7,000 first and wait for the delivery of cocaine and that Simpson was unwilling to do that, that he wanted a simultaneous exchange of the money and the cocaine. Then when he went uptown the same conversation took place there, and the defendant, according to Simpson, later on said he could get him some flake cocaine from somebody in the Bronx or uptown and that that would cost him $6,500 for a quarter of a kilo, instead of $7,000 for a quarter of a kilo. But the fact that there was no sample of cocaine and that none was produced would not legally prevent you from coming to the conclusion that a conspiracy existed to deal in cocaine, if you accept the testimony of the Government agents, particularly Simpson, and if you draw from that testimony the inferences which the Government suggests are the reasonable inferences to draw.

If, upon such consideration of all the evidence, direct or circumstantial, you find beyond a reasonable doubt that the minds of the alleged conspirators met in an understanding way and that they agreed, as I have explained a

conspiratorial agreement to you, to work in furtherance of the unlawful scheme alleged in the indictment, then, proof of the existence of the conspiracy is established.

In this connection, it is not necessary for the Government to prove the success of the conspiracy in order to show a violation of statute. A conspiracy is basically the agreement to violate the law; it may exist even though the final objectives were never accomplished.

Once satisfied that the conspiracy charged existed, you must ask yourself who its members were. In deciding whether the defendant was a member of the conspiracy, you should consider whether on all the evidence, the defendant knowing and purposely entered the conspiracy.

In determining whether the defendant became a member of the conspiracy, you must determine not only whether he participated in it, but whether he did so with knowledge of its unlawful purpose. Did he join with awareness of at least some of the basic aims and purposes of the conspiracy? Knowledge is a matter of inference from facts proved. It is not necessary that a defendant be fully informed as to the details of the scope of the conspiracy in order to justify any inference of knowledge on his part. To have guilty knowledge, a defendant need not know the full extent of the conspiracy and all of its activities and actors.

I want to caution you that mere association with one or more of the conspirators does not make one a member of the conspiracy. Nor is knowledge without participation sufficient. What is necessary is that a defendant participate with knowledge of at least some of the purposes of the conspiracy and with intent to aid in the accomplishment of those unlawful ends.

Once you have found the conspiracy to exist and the defendant to have knowingly participated in it, the extent of his participation has no bearing on his guilt or innocence. The guilt of a conspirator is not measured by the extent or the duration of his participation. Even if he participated in it to a degree more limited, than that of the co-conspirators, he is equally culpable so long as he was, in fact, a conspirator.

You will recall that the defendant, according to Government's proof, is not shown to have been present at any of the conversations at East 61st Street; he was shown to have been present Uptown in the vicinity of 96th - 97th Streets and Park Avenue, both with and without the agents who testified about those meetings. And then you have the two exhibits, the conversation by telephone with Agent Simpson, which you should scrutinize carefully, because Ms. Piel has placed upon it an interpretation very different from

that which the Government suggests you should place upon it, and you must consider just what conclusions you should come to with respect to that, as well. You can help yourselves to determine what it means when you have scrutinized the other evidence relating to the defendant's activities, and determine just what his role was.

When people enter into a conspiracy to accomplish an unlawful end, they become agents for one another in carrying out the conspiracy. Hence, the acts or declarations of one in the course of the conspiracy and in furtherance of the common purpose are deemed to be the acts of all, and all are responsible for such acts.

Accordingly, if you find, in accordance with those instructions, that the alleged conspiracy existed and that the defendant was a participant in it, then acts done and statements and declarations made in furtherance of the conspiracy by the persons found by you to have been members of the conspiracy may be considered against the defendant, even though such acts or declarations were made in the absence and without the knowledge of the defendant.

32 It is important to note that this principle applies only to the acts and declarations done or made during the continuance of the conspiracy and in furtherance thereof, that is, to carry out an unlawful objective or purpose of the

conspiracy. It does not apply to acts or declarations which do not have these characteristics.

Simpson testified that he was buying cocaine from Hardy and he wanted to find out the source of supply, and that that was the reason that he went to 22 East 60th Street, to introduce the other agent as though he were his brother and give the impression that they were bona fide purchasers of cocaine, that they wanted a quarter of a kilo for $7,000. Incidentally, those of you who may not be familiar with the metric measure and do not know what a kilo is, it is approximately 2.2 pounds; it is little more than two pounds; so a quarter of a kilo is little more than half a pound. It is a substantial quantity when you are dealing with cocaine, and $7,000 is a very real and substantial amount of money, even in these days of inflation.

Now, when Agent Simpson went there and introduced Gordon as his brother, they discussed the purchase of cocaine, according to his testimony, a quarter of a kilo for $7,000. And Feldon, the occupant of this top floor apartment,made a phone call. He said that his associate would arrive later. Then later on, lo and behold, Michael Gerald Hardy arrives, the alleged co-conspirator, and they repeat the conversation with him. And Hardy says, well, his source of supply is Uptown and they have to go Uptown, and

that is when, according to Simpson and Gordon, they went Uptown, and there, according to their testimony, Reed appears on the scene with his Cadillac limousine, which he used for hire. And we have the testimony about the call that he made from a candy store, the discussion whether he would get the money first and the agent refusing to pay the money first and wanting him to put up the money at the same time they got the merchandise, and then the defendant comes back from the candy store and he tells Simpson he has a friend at 133rd Street, and he has got flake cocaine, and that he would sell that quarter kilo for $6,500.

Then we get to February 19. We have the phone call that has been taped, and you have the observation of the defendant Reed in the vicinity of 96th Street and Park Avenue in the same limousine. He goes around the block, he makes a call from a candy store, and he goes into that R & O Carpet Store, which we will hear about later after he is arrested, and he came out with a man, and goes into his car and goes away. No contact with Simpson.

Now, Kobell testified toward the end of the Government's case that he was one of the arresting officers, that he arrested him on November 19, 1974, and at that time the defendant Reed spoke to him and said, yes, he negotiated for the sale of a quarter of a kilo of cocaine, $7,000, and

then his source of supply was this fellow Red, who worked at the R & O Carpet Store on 97th and Park, I believe the address was;it was in the vicinity of 96th and Park, a very short walk away. He said that was the source of supply.

Now, if you accept the testimony of Simpson, Gordon and Kobell and the other agents, a case has been made out. That would sustain the allegations of this indictment against the defendant.

Ms. Piel has argued to you that these agents, all of whom enjoy munificent salaries, are out to get people to commit crime, and she said at one time he tried to get the defendant to commit crime, that the defendant is a small time cab driver, that he tried to dress him up as a drug dealer, "He was trying to make a criminal out of my client." Well, ladies and gentlemen, let me tell you, if you think that these agents were liars, and that they framed this man and they made this all up because they wanted to make a case, please acquit him right away; don't spend five minutes on the case; because if that is what they did, they committed an even more serious crime than this defendant is charged with having committed, they violated every oath in the book, including the one that they took when they said that they would tell the truth. We are not here to countenance anybody's being framed or any poor man, rich

man, or middle class man being framed. That is not what our law is intended to do.

The agents have been criticized by defense counsel because in doing their work they don't tell the truth. Now, ladies and gentlemen, please don't be so naive as to believe that an agent who is trying to enforce the drug laws can go out with a neon sign over his head saying, "I am a special undercover agent of the Drug Enforcement Administration," because if he did that you would understand that he would find nobody and that he would scare away potential sellers of cocaine, just as a flit can scares away ants. They have to use guile and strategm; the use of guile and strategm by an undercover agent is an essential part of his work, and there is nothing blameworthy about his doing that.

33 What is blameworthy and what should be condemned without any possible mercy would be if they took this witness stand and perjured themselves in order to frame a defendant. That is a crime which cannot be condoned and which you should condemn if you think they have. If you think they have lied, you should reject their testimony. But the fact that undercover agent introduces another man as his brother who is not his brother, but another agent, or the fact that he does not tell him there are two or

three armed agents downstairs waiting to protect them, and the fact that he does not reveal his official connection, the fact that he does not tell them, "This is Government advance money I am using; I already took the serial numbers, because I got to account for this money once I make the sale," it would be almost childish to believe that the drug laws could be enforced if strategm and guile were not used. I am not, in any way, however, attempting to underwrite the credibility of any witness in this case. As I told you at the outset, ladies and gentlemen, these agents appear as witnesses; their credibility is for you to decide, not for me to decide. But once you have looked at that testimony and considered it, if you accept it, then you should come as reasonable persons to certain conclusions. If you reject it, then you should come as reasonable persons to other conclusions. It is pretty much that which is the crucial issue in this case.

Now, circumstantial evidence. What do we mean by that? Circumstantial evidence is presented to you whenever you are supplied with facts from which you are asked to deduce that other facts also exist. You are permitted to resolve disputed questions of fact on the basis of direct evidence, circumstantial evidence, or both. The testimony of an eye witness based upon knowledge acquired as a result of

actual and personal observation is direct evidence of what the witness observed. Evidence of facts which allow you, based on your common experience, to deduce or conclude that other facts or events occurred is termed circumstantial evidence.

Circumstantial evidence is proper and competent proof. Circumstantial evidence appeals to the common sense and common experience of mankind. The teach us that the known existence of some facts necessarily implies that other facts connected with them exist. Sometimes circumstantial evidence is even more convincing than direct evidence, because direct evidence may depend upon the memory or observation and truth of one witness, while circumstantial evidence may be based upon the memory, observation and truth of many witnesses who concur and agree, or upon physical facts which cannot be mistaken and cannot speak falsely.

For instance, part of the circumstantial evidence in this case is the fact that Reed was up there at 96th Street and Park Avenue and in and out of the R & O Carpet Store and in and out of the candy store making phone calls. Was he a small time cab driver looking for a fare or looking for someone to pick up for his car service? Or was he a cocaine dealer trying to nail down a $7,000 deal? That is one of the crucial questions you should ask yourselves.

Now, let us talk about the overt acts and let me read them to you. There are three here in the indictment, and they read as follows:

"In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

"1. On or about the 13th day of February, 1974, the defendant Gerald Michael Hardy had a conversation with William Simpson at 26 East 60th Street, New York, New York;

"2. On or about the 13th day of February, 1974, the defendants James Reed and Gerald Michael Hardy had a conversation with William Simpson in the vicinity of 96th Street and Park Avenue, New York, New York;

"3. On or about the 19th day of February, 1974, the defendant James Reed went to the vicinity of 96th Street and Park Avenue, New York, New York."

As I have already mentioned, the fourth essential element of the crime of conspiracy is that an overt act to effect the object of the conspiracy be committed by at least one of the co-conspirators. An overt act is any step, action or conduct which is taken to achieve or further the object of the conspiracy. The overt act need be neither criminal nor the very crime which is the object of the

Obviously, for people to meet, have conversations, or to go to the vicinity of certain areas is not necessarily in and of itself criminal conduct. But when, as the Government charges, and if you so find, the purpose of the acts was to effect drug transactions, then these meetings shed their innocent character and become overt acts to further the purpose of an illegal enterprise.

It is not necessary for the Government to prove that each member of the conspiracy committed or participated in the particular overt act, since the act of anyone done in furtherance of the conspiracy becomes the act of all the other members. Also, the Government is not required to approve each of the overt acts; it is sufficient if it proves the commission of at least one of the overt acts at or about the time alleged.

Now, in this case you heard the testimony of William Simpson, Kieran Kobell, Carliesle Gordon -- I am not sure I have the right first names correct -- Paul Sennett, and Thomas Sheehan, all of them drug enforcement officers. Simpson, Kobell and Gordon were particularly important; the other two were surveillance officers and they have their importance, too, because they presented you with circumstantial evidence which you can or need not accept, depending upon your view of the entire evidence.

34

But I will tell you now that if you reject the testimony of Simpson, Kobell and Gordon, those three, the Government's case cannot stand; they are the ones who provide the essential elements of the case. The surveillance agents provide only peripheral and circumstantial proof, which in this case in and of itself would not be enough coming from them to constitute proof of a crime.

You are the sole judges of the credibility of each of the witnesses who has testified in the course of this trial; you are the sole judges of the weight that should be given to any of their testimony. You should consider the probability of their testimony, the inherent probability of the facts to which they testified; you should consider their demeanor while on the stand, the force and effect of contradictory statements, if any were made, the interest of the witness or lack of interest in testifying as he did, and, above all, the quality, not the quantity of the proof, and if you believe that any of these agents is guilty of wilfull falsehood -- and that charge has been made by defense counsel in this case -- you should then reject all of the testimony of that witness whom you believe guilty of falsehood, or you can, if you wish, reject only that part which you believe is tainted, and accept that part which you believe to be credible. It is like a person eating a fruit which is

apparently wholesome and sound, but suddenly discovers an imperfection. Some people will cut out the imperfection and eat the rest of the fruit; others will reject all of it. That is what you do with testimony that you believe to be tainted by a wilfull falsehood.

In determining whom you believe and what weight you will give to the testimony of the witnesses, consider the nature of the evidence given by them, their bias or prejudice, if any has been disclosed, their opportunity to know and remember the facts about which they testified, their manner and deportment while on the stand, their candor or frankness or lack of it, their interest, if any, in the result of this trial, the extent to which they are corroborated or contradicted by other proof, the probabilities, as indicated by your common sense and sound judgment, that the things asserted in their testimony actually existed or occurred, and such other facts appearing in the evidence as will, in your opinion, aid you in determining the extent to which their testimony is worthy of belief. Throughout this process you will be using your common sense and understanding to assign to the testimony of each witness the value and weight which best appeals to your judgment.

Now, the tape and the transcript were introduced as evidence as to conversation between Simpson and the

defendant. I not believe there has been any serious dispute that it was not the defendant who spoke to Simpson. I think the great dispute in the case is what was meant by the conversation. At any rate, remember that the tape and the transcript were really like a chart; they are visual aids; and they are oral aids, if you like. The tape and the transcript should be given no more and no less importance than the importance that you attach to the testimony of Simpson, because it is Simpson's credibility that is at stake, and the transcript was made up as an aid to you to follow the conversation. Nobody can make up an exhibit for a case, any more than an expert can draw a chart on that blackboard to make up evidence. All he can do, if he is an accountant, he adds up figures to help you come to a conclusion on the basis of figures, or an engineer will draw a diagram. But, essentially, it is the credibility of the witness himself that is crucial to your assignment of probative value. The tape and the transcript are not in themselves evidence independent of the testimony of Simpson. But you are entitled to consider the tape and the transcript received in evidence if they help you to determine what occurred, what Simpson did, and what probative value you should attach to his testimony.

The defendant did not take the stand to testify

in his own behalf. I instruct you that you are to draw no adverse inferences from this. Our Constitution guarantees the defendant the right to remain silent throughout the trial, and you are not to let his exercise of this right influence you in your determination of his guilt or innocence. You should not speculate as to the reasons for a defendant's failure to testify, nor should you permit this matter to enter into your appraisal of the evidence in any way.

Admissions made by a defendant freely and voluntarily are potent evidence against a defendant. Ordinarily, one does not acknowledge he committed a crime or make admissions against his own interest which may involve him in wrongdoing, unless such is the fact.

Here you have the testimony of Agent Kobell, who testified that after his arrest on November 19, the defendant admitted his participation in the transaction of a quarter kilo sale for $7,000 of cocaine, and he said that the defendant's source of supply was Red at the R & O Carpet Store on 97th Street and Park Avenue. You see, if you accept that testimony, ladies and gentlemen, it will take you a long way in the direction of resolving the case. If you reject it, the opposite will be the case.

You should not consider any question of punish-

ment. Several times during the defense summation counsel said to you, "Would you stamp this man as a felon"? Ladies and gentlemen, you are not stamping anybody; you are finders of the fact. If a crime occurred here, it has already occurred, it is an historical fact. You are trying to find out on the basis of the evidence whether it did occur, and if you find on that evidence that it did occur, you are not stamping anybody with anything; all you are doing is making a finding of fact that something happened in the past, and whether it happened or not is something beyond your control.

35 The Clerk when you come back will ask your foreman a very significant question, he will say, "Have you reached a verdict"? If the answer is, "Yes", he will say, "How do you find"? "How do you find" has a tremendously profound traditional significance. What it means, ladies and gentlemen, is having looked at this evidence and having considered the applicable law, what conclusions have you come to with respect to what happened back in February, 1974? What happened on November 19, 1974? That is what he is asking you. And that is what you must reply to.

You should not permit questions of sympathy, penalty, or anything else influence your verdict. The duty of imposing sentence is a very painful duty and a difficult one, and that rests exclusively upon my shoulders. Your

function is to weigh the evidence in the case and to determine the evidence of the defendant solely upon the basis of such evidence and the law as I charge you. You are to decide the case upon the evidence, and the evidence alone, and you must not be influenced by any assumption, conjecture, or sympathy, or any inference not warranted by the facts until proven to your satisfaction.

If you fail to find beyond a reasonable doubt that the law has not been violated, you should not hestiate for any reason to find a verdict of acquittal. But, on the other hand, if you should find that the law has been violated as charged, you should not hesitate because of sympathy or any other reason to render a verdict of guilty as a clear warning that a crime of this character may not be permitted with impunity.

Ladies and gentlemen, as soon as the lunch arrives, I will stop, and I can continue after lunch.

Your verdict must be unanimous and it should represent the conscientious determination of each and every one of you. Remember that the essence of jury function is a consensus, a coming together of your views, a joint discussion and a joint agreement that this should be your conclusion. You should do it conscientiously, by conscientious listening and conscientious explaining. Remember that there

is no room in the jury room for a Mr. and Mrs. take charge, and there is no room for a wall flower, either. You should be just as anxious to listen as you are to tell your own point of view. Then you should come to your conclusion without fear, favor or prejudice of any kind, as you swore to do at the outset of the case. Remember, that a case is not a battle of wits, it is not a contest in salesmanship, it is not a battle of personalities; it is an attempt to reach the truth under rules of law, and only the truth should triumph. If you can leave this courthouse after this case with an inner conviction that truth as triumphed, then justice has been done. If you cannot leave with that conviction, then something else has been done.

I suggest that you start from the facts you find are easy to resolve. You may find that there are certain facts in this case about which there should not be any dispute. Lay them all out, just like you are building a house or erecting a structure, and then proceed from those facts to the facts which you find are more difficult to resolve.

If you want to refer to the record, of course, the testimony is available, but it will have to be read to you in court; there is no way I can send in the testimony. If you want to hear the evidence, you have to come back and listen to it in court. If you want the exhibits, I think

the best thing to do is to send them in to you. You can have the cassette and listen to it. I will send in the tape, the transcript, the cassette and the indictment. You can use them as you wish. If you need any further explanation of my charge, if there is something I said that you find difficult to work with, please ask me questions. Ask for my guidance, make me come back; I will be happy to serve you in any way that I can. It is my duty to make the law as clear as I possibly can, to make your functions understandable to you, and if for any reason they have not been clear or something is confusing you, let me know. Don't give yourselves legal advice. That is one of the worst traps a jury can fall into. Ask me for my guidance; write me a note, and I will be glad to be at your service throughout your deliberations. Don't speculate as to the evidence in the case; you are not here to solve a riddle or to supply missing links to a scenario. You must look at this evidence; you've got to draw the inferences that you think are warranted by common sense and good judgment and then come to your conclusion. But don't ever say, "Oh, if so and so had only been called, I know he would have said this." You can say that to the author of a TV play, but not in court. That would be speculating as to the evidence, and you must not do it.

Your form of verdict is either guilty or not guilty. This is only a one-count charge, conspiracy to violate the Federal Narcotics Laws. Your verdict should be, "We find the defendant guilty," or, "We find the defendant not guilty." Those are the only two possible verdicts.

I want to thank Barbara Dresner and Joyce Leeds for their kind attention and presence and tell them that as soon as the jury retires to consider their verdict, they can leave. If you have ordered lunch, please stay for lunch, but don't discuss the case, and when you finish lunch, you can leave. In other words, the only jurors who should discuss the case are twelve jurors, those jurors other than Mrs. Dresner and Miss Leeds. So, please remember that, and as soon as the two alternates have left, then begin your deliberations. I will be at your service.

36 Just one other note that slipped out of my notes here. I think I can remember it accurately. This indictment charges unlawfully, wilfully and knowingly. What do we mean by "unlawfully, wilfully and knowingly"? We mean somebody who purposely, intentionally seeks to violate the law, not somebody who acts through stupidity, not somebody who makes a mistake in good faith, no matter how stupid he may be. We are dealing here, and this indictment and the law seeks to reach persons who know they are violating

the law, who know they should not deal in cocaine or hard drugs, and who set out to violate those laws knowing that they are dealing in hard drugs, and in this particular case, cocaine. It must be activity coupled with a bad purpose voluntarily, purposefully, and with an intent to violate the narcotics laws.

I think I have said all I need to say. I have got to give the attorneys an opportunity to take any exceptions .

I would appreciate if you remain in your seats for just a moment. I hope it will be brief. I authorize the Clerk if lunch comes, you can go out and get your lunch.

Will counsel come into the robing room?

[In the robing room:]

MS. PIEL: My most important exceptions, in addition to the exceptions that I already made with regard to your refusal to give the defendant's proposed instructions -- have you marked that as an exhibit --

THE COURT: I will see that it is done when I go out.

MS. PIEL: We come back to that Kobell testimony, and it seems to present quite a problem. Your Honor several times mentioned, not once, three times, I have it here, during your charge, that the defendant had in his

admission or his confession or whatever we call that statement upon his arrest, that he was going to sell a quarter of a kilo of cocaine for $7,000. You said it once, you said it twice, you said it three times. And there is nothing in the statement about the $7,00. Now, that torpedoes my summation, and I will tell you how it does it.

THE COURT: Negotiate to sell a quarter kilo.

MS. PIEL: There is no mention of $7,000.

THE COURT: I will correct it. I will say I was mistaken when I said that Kobell referred to $7,000, that he did not refer to $7,000, that he referred to a quarter of a kilo.

MS. PIEL: The essence of my summation was that the conversation that was supposed to have taken place on the 13th concerned what Simpson said was a definite conversation, was a definite deal for a quarter of a kilo of heroin for $7,000, or then later a quarter of a kilo of flake cocaine for $6,500, and I said in the conversation of the 19th there was no mention of either amount or money and that the defendant didn't seem to know at that time what the specifics were.

THE COURT: Do you want to hear the testimony again of Kobell? He did refer to a quarter kilo.

MS. PIEL: There was no mention of $7,000.

THE COURT: I am sorry I made that mistake.

MS. PIEL: You made it sound as though every aspect of this were worked out, and it really distorts my whole attack on credibility.

THE COURT: I will do anything you suggest to withdraw the $7,000. If you want me to withdraw the $7,000, I will say I made a mistake and $7,000 was not mentioned.

MS. PIEL: Thank you, at no time did the defendant make any confession with regard to a transaction for $7,000.

THE COURT: But he mentioned a quarter kilo, he mentioned cocaine, and he mentioned that the man at the R & O Carpet Company was his source of supply.

MS. PIEL: I am not challenging that.

THE COURT: Why don't I let them hear Kobell's testimony.

MS. PIEL: What we are doing is putting emphasis on it. I think your Honor misled the jury.

THE COURT: I misled them to the extent of mistakenly injecting $7,000 in Kobell's testimony, and I am sorry I did it, and I am prepared to withdraw it. But may I respectfully suggest that I think the cure is worse than the disease.

MS. PIEL: That is part of the problem. That is why I say I don't know how it can be cured.

THE COURT: I don't want to run your case. I will tell them, referring to the Kobell testimony I mentioned the figure $7,000 and I was mistaken in mentioning that figure, because he did not mention it.

MS. PIEL: Okay. Fine. I think it is the best that can be done under the circumstances.

THE COURT: I think so. What else?

MS. PIEL: And the instructions that were not given.

THE COURT: Have you anything?

MR. BATCHELDER: No, sir.

[Proceedings continued in the courtroom.]

THE COURT: Ladies and gentlemen, I made a mistake in recalling the testimony of Kobell and I want to correct it. I don't want to repeat what I said, but I did inject into that testimony the figure of $7,000. Kobell didn't use any figure of any amount of money when he testified, and so my using that amount of money when I referred to his testimony was incorrect, and I want you to disregard what I said to that extent. I think that is all I need to say. I want to thank you again for your attention. I am sorry I have taken a little longer than I had hoped. I hope

your lunch will arrive quickly and that there won't be any further problems. If I can be of further assistance, please don't hesitate to send me a note. In the meantime, I will get those exhibits ready and send them in.

Swear the marshals.

[Marshals sworn.]

[The jury retired to begin its deliberations at 12:50 p.m.]

THE COURT: Have you got a clean copy of the indictment?

MR. BATCHELDER: Yes, I do.

THE COURT: Have you shown it to Ms. Piel? How about the cassette? Send in the cassette, the tape and the transcript. We will recess until 2:20 p.m. for lunch.

[Defendant's request to charge marked Defendant's Exhibit E for identification.]

[Luncheon recess taken.]